

1 IMPERIUM PATENT WORKS
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9 Attorneys for Plaintiff and Counterdefendant
10 ZINUS, INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 ZINUS, INC., a California corporation,

15 Plaintiff,
16 v.

17 SIMMONS BEDDING COMPANY, a
18 Delaware corporation, and DREAMWELL,
19 LTD., a limited liability company of
20 Nevada,

21 Defendants.

22 DREAMWELL, LTD., a limited liability
23 company of Nevada,

24 Counterclaimant,
25 v.

26 ZINUS, INC., a California corporation,

27 Counterdefendant.
28

Case No. 07-CV-03012 PVT

**DECLARATION OF DARIEN K.
WALLACE IN SUPPORT OF
ZINUS, INC.'S MOTION FOR
SUMMARY JUDGMENT OF
NON-INFRINGEMENT DUE TO
NO DIRECT INFRINGEMENT**

1 I, Darien K. Wallace, declare:

2 1. I am member of the Bar of this Court and an attorney with the law firm of
3 Imperium Patent Works, counsel of record for plaintiff and counterdefendant ZINUS, INC.
4 in this case. If called upon as a witness, I could and would competently testify to the truth of
5 each statement herein.

6 2. Attached hereto as Exhibit A is a true and correct copy of deposition exhibit 214
7 and pages 113-116 from the transcript of the deposition of Scott Reeves, which was taken in
8 this action on February 11, 2008.

9 I declare under penalty of perjury under the laws of the United States of America that
10 the forgoing is true and correct.

11 Executed this 19th day of February 2008 in Sunol, California.

12
13 /s/
14 Darien K. Wallace
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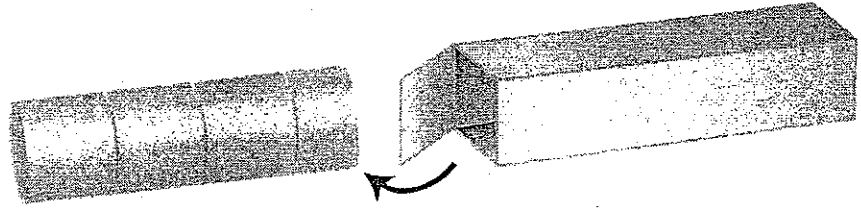
EXHIBIT A

SLUMBER[®] 1[™]

Direcciones en Desempacar de colchón

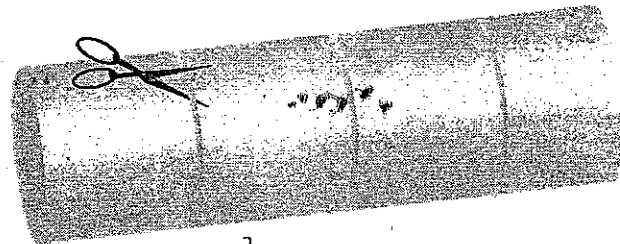
LEA POR FAVOR ESTAS DIRECCIONES COMPLETAMENTE ANTES DE DESEMPACAR SU NUEVO COLCHON

1. Prepare el lugar donde su colchón será utilizado tal como una base plana para cama o "Box Spring" asegúrese de que este limpio, plano y suficientemente resistente para soportar el peso, tal como las bases SmartBase[™] o SmartBox[™]. Coloque la caja en su lado y quite el colchón que viene comprimido.



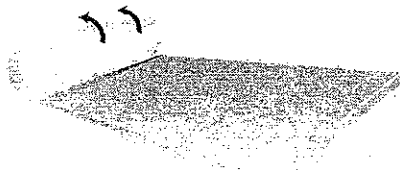
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2. Utilizando las tijeras, corte con cuidado la cinta que mantiene el colchón apretadamente enrollado. Tenga cuidado para evitar que las tijeras corten en el plástico protector. (NO UTILICE NINGUN TIPO DE CUCHILLO). Por este momento no corte la envoltura interior, plástica y clara.



2

3. Con la envoltura plástica clara todavía intacta, desenrole y despliega el colchón comprimido y colóquelo en la posición donde usted estará durmiendo.

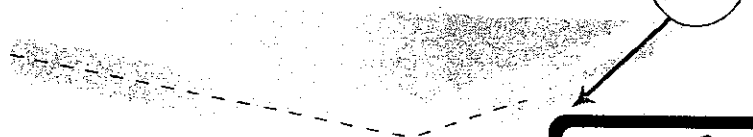


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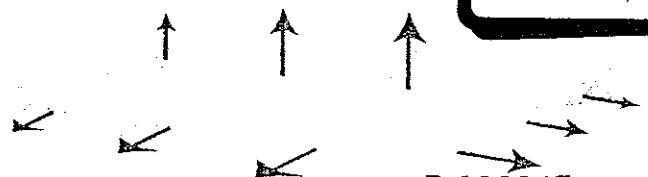
3-2

4. Con cuidado corte la bolsa plástica clara por las orillas. El colchón comienza instantáneamente a descomprimir. Quite la bolsa.



4

5. El colchón está listo para ser utilizado en este mismo momento usted ya puede agregar las sábanas y las mantas. Cosméticamente, puede tomar hasta 48 horas para que la cama tome completamente a su forma original.



5

EXHIBIT 214
WIT: Reeves
DATE: 2-1-08
LOUISE SOUSOURES, CSR #3575

P 002247

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1 THE WITNESS: Yes.

2 BY MR. WILSON:

3 Q. Zinus understands that customers, in fact, do
4 allow the compressed mattress to uncompress to its
5 original state, correct?

6 A. Correct.

7 MR. WILSON: I'd like to have marked as
8 Exhibit 214 a document bearing Bates number P 002247.

9 (Exhibit No. 214 was marked.)

10 BY MR. WILSON:

11 Q. Do you recognize Exhibit 214?

12 A. I haven't seen this one.

13 Q. Do you understand Spanish?

14 A. No, I don't.

15 Q. Do you read Spanish?

16 A. No, I don't.

17 Q. Do you know whether Exhibit 214 relates to the
18 inner spring Mattress-in-a-Box product?

19 A. No, I don't.

20 Q. I'll note that the pictures on Exhibit 214 are
21 very similar to the pictures on Exhibit 213.

22 Does that help you at all in determining
23 whether this relates to the inner spring
24 Mattress-in-a-Box product?

25 A. Well, it helps me understand that it's a

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1 Mattress-in-a-Box, but again, we manufacture foam and we
2 manufacture air and we manufacture inner spring.

3 So it doesn't help me understand whether or not
4 it's one or the other of those.

5 Q. In paragraph number 5 down at the bottom, you
6 see the last sentence, Cosmeticamente, starting with
7 that word, puede tomar hasta.

8 Do you see where I'm referring to?

9 A. Yes.

10 Q. Do you understand what that statement means?

11 A. No, I don't.

12 Q. To your knowledge, has Exhibit 214 ever been
13 included in a box?

14 A. Not to my knowledge.

15 Q. Is it possible that Exhibit 214 has been
16 included in a box of inner spring Mattress-in-a-Box
17 product that Zinus has sold?

18 A. Perhaps, but I don't -- I don't know.

19 Q. To your knowledge, has --

20 A. This document could be in development, for all
21 I know.

22 Q. To your knowledge, has -- strike that.

23 Do you see the reference to Slumberl up at the
24 top?

25 A. Uh-huh.

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1 Q. What does that refer to?

2 A. Just a brand name, one of our brand names.

3 Q. When did Zinus start using that brand name?

4 A. It's one of several brands that we have and
5 depending upon the customer, we'll offer that brand
6 name.

7 It could be in foam, it could be in springs, it
8 could be in an air bed.

9 Q. When did Zinus start using it?

10 A. We haven't really used it yet.

11 Q. Has Zinus ever represented to customers that
12 cosmetically it may take up to 48 hours for a bed to
13 completely return to its original form?

14 A. Well, that depends.

15 MR. WALLACE: Objection, vague. Objection,
16 vague.

17 THE WITNESS: That depends on whether it's
18 memory foam or inner spring.

19 Inner spring, no.

20 And if someone does represent it under an inner
21 spring scenario, it would be a customer of ours that
22 elects to do that.

23 BY MR. WILSON:

24 Q. What do you mean when you say it's a customer
25 that elects to do that?

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1 A. One of our customers may elect to do that.

2 Q. When you say elect to do that, you mean --

3 A. They would decide the wording on their
4 instruction sheet. They may be using our brand, but
5 they may be designing the content of the instruction
6 sheet.

7 Q. Is this an instruction sheet prepared by Zinus
8 or by a customer?

9 A. Don't know, but I don't think anyone in our
10 company speaks Spanish.

11 So I would suggest that it would be someone
12 else.

13 Q. You've had quite a number of conversations with
14 Wal-Mart, correct?

15 A. Yes.

16 Q. Do you have an understanding as to whether
17 Wal-Mart believes it's important to correctly represent
18 its products to its customers? Let me ask it again.

19 Do you have an understanding, based on your
20 interactions with Wal-Mart, as to whether Wal-Mart
21 believes it's important to accurately represent its
22 products to its customers?

23 A. I believe they would like to accurately
24 represent, but sometimes they are very conservative and
25 sometimes they make decisions on their own as to what